IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923.
No. 781.

EASTMAN KODAK COMPANY OF NEW YORK,
Petitioner,

against

SOUTHERN PHOTO MATERIAL COMPANY,
Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

John W. Davis,
Alexander W. Smith,
Frank L. Crawford,
Clarence P. Moore,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1923.

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	No. 781.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

I.

The petitioner is a New York corporation engaged in the manufacture of photographic goods, and having its principal place of business in the City of Rochester, State of New York. The respondent is a Georgia corporation engaged in the sale of such goods and having its principal place of business in the City of Atlanta, Georgia. Petitioner has done no business in the State of Georgia. (See petition page 9.) This action was brought to recover damages, and damages have been awarded to the respondent, as a result of alleged breaches of the Sherman Act by the petitioner. For some nine years respondent continuously participated in the system by which petitioner carried on its business, and if this system was

illegal, petitioner claims and has at all points in the litigation claimed and maintained that respondent was an active participant in the petitioner's alleged wrongdoing, and was, therefore, *in pari delicto* with the petitioner; that hence the amount of profits earned by the respondent during the period when it was a customer of the petitioner cannot be used as a standard to measure damages alleged to have been sustained by respondent for the period for which respondent was allowed to recover; and that inasmuch as the whole of respondent's claim for damages rested upon such proof of earlier profits, there was no competent proof of damages in the record. The Court of Appeals for the Fifth Circuit held otherwise, thus creating a conflict between that Court and the Courts of Appeals for the Second and Third Circuits, in which the precise question has been decided in accordance with the position here taken by petitioner.

II.

This Court will grant a writ of certiorari to review the final judgment of a United States Circuit Court of Appeals, where the case is one in which, under the statute, the decision of the latter Court would have been final save for the power of this Court to grant a certiorari and where the question involved is important, or where the necessity of avoiding conflict between two or more United States Circuit Courts of Appeals demands that such writ be granted.

Forsyth v. *Hammond*, 166 U. S. 506, 514.
St. Louis, K. C. & C. RR. Co. v. *W. RR. Co.*, 217 U. S. 247, 251.
Diamond Rubber Co. of New York v. *Consolidated Rubber Tire Co.*, 220 U. S. 428.
Carpenter v. *Winn*, 221 U. S. 533, 543.

III.

Where there is doubt whether a writ of error is the proper remedy, it is the correct practice to petition also for a writ of certiorari, the Court postponing the consideration of this petition until the hearing on the writ of error.

Spiller v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 120.

Phila. & Reading Ry. Co. v. *Hancock*, 253 U. S. 284.

Bullock v. *R. R. Comm. of Florida*, 254 U. S. 513.

IV.

A review of the judgment of the Circuit Court of Appeals is necessary in order to avoid conflict between the Circuit Court of Appeals for the Fifth Circuit on the one hand, and the Circuit Courts of Appeals for the Second and Third Circuits, respectively, on the other, in respect to the following question:

Whether, assuming that petitioner's system of doing business through its restrictive Terms of Sale, as described in the petition, was unlawful, the respondent, having conformed to and obtained the advantages of said system down to April, 1910, and having been up to that date an active and voluntary participant in the unlawful acts of the petitioner, if such they were, was not during said period *in pari delicto* with the petitioner, and if so, whether the respondent should have been allowed to prove profits made by it during the period when it was so *in pari delicto*, as a standard by which to measure damages alleged to have been sustained by the respondent after it had ceased to be petitioner's customer.

That there is such conflict in regard to this question is clearly shown by the following:

The Circuit Court of Appeals for the Fifth Circuit, in its decision affirming the judgment of the Court below, held that the point just stated was not well taken, and that the respondent was not *in pari delicto* with the petitioner, saying (Rec.):

> "There was evidence from which the jury could justly reach the conclusion that the plaintiff was not a party to the alleged monopoly, and, therefore, was not *in pari delicto* with the defendant. The jury could well have believed that the plaintiff complied with defendant's restricted terms of resale for the reason that otherwise the plaintiff could not purchase or secure the goods necessary in the conduct of its business. The plaintiff was a small concern and its approval or disapproval of defendant's method of doing business was a matter of no moment."

The United States Circuit Court of Appeals for the Third Circuit held to the contrary on the precise question in *Victor Talking Machine Company* v. *Kemeny*, 271 Fed., 810, where Woolley, *C. J.*, said at page 819:

> "* * * We are constrained to hold that the learned Trial Judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits cannot, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition and create monopoly."

The facts in the case last cited were closely analogous to those in the instant case and the questions involved were identical.

The United States Circuit Court of Appeals for the Second Circuit also decided the same question in accordance with the position here taken by petitioner, in the case of *Eastman Kodak Company* v. *Blackmore*, 277 Fed. 694, at page 699 where, Mayer, *C. J.* said:

> "If plaintiff and defendant were engaged in an illegal restrictive system, from 1899 to 1902, obviously that period cannot be set up as a standard with which to compare the profits of the period after 1908. It is necessary upon this point to refer merely to what was said in *Victor Talking Machine Co.* v. *Kemeny, supra*, at pages 818 and 819."

In this last cited case, the plaintiff-in-error was the present petitioner and the alleged illegal system referred to was the very same as that which is the subject of the instant case. Defendant-in-error, Blackmore, in the case just cited, had, like the respondent in the instant case, operated for a long period under the identical Terms of Sale which are here under consideration, in all practical respects as did the respondent in the instant case.

V.

(*a*) Mere participation and acquiescence by the respondent in petitioner's unlawful system, if such it was, made the respondent a party to the wrongdoing and itself a violator of the Sherman Act.

Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227.

Bluefields Steamship Co. v. *United Fruit Co.*, 243 Fed. 1, 13, 18; C.C.A. 3rd Cir., June 26, 1917.

Victor Talking Machine Co. v. *Kemeny*, 271 Fed. 810, 816-17; C. C. A. 3rd Cir., March 4, 1921.

Eastman Kodak Company v. *Blackmore*, 277 Fed. 694; C. C. A. 2nd Cir., Dec. 14, 1921.

Cooley on Torts, p. 254.

Bluefields Steamship Company v. *United Fruit Co.*, 243 Fed. 1, was decided by the Circuit Court of Appeals for the Third Circuit in June, 1917. In that case plaintiff had gone into a combination with the defendant, but becoming dissatisfied with defendant's conduct of the business, sued the defendant for damages. It was held that the plaintiff could not recover, inasmuch as the evidence showed that the plaintiff had participated in, acquiesced in and ratified the acts complained of. Woolley, *C. J.*, says at page 13:

> "* * * If the things complained of were things agreed to or acquiesced in, then manifestly, if they were unlawful, the plaintiff was *in pari delicto* and was without right to recover."

and again at page 18:

> "If the Sherman Act was violated by the combination in which the Bluefields Company participated, and injury to that Company was a natural consequence, then the case comes within the well-settled principle that where a criminal combination is made or a criminal enterprise is undertaken by two parties and either party violates the agreement with injury to the other, the law will afford the injured party no redress but will leave him as it finds him. *In pari delicto potior est conditio defendantis.*"

Eastman Kodak Company v. *Blackmore*, 277 Fed., 694, was decided by the Circuit Court of Appeals of the 2nd Circuit, December 14, 1921. In that case,

plaintiff Blackmore, who had been a customer of the defendant, Eastman Kodak Company, under the very system and Terms of Sale involved in this case, had been dropped from its list of customers by the defendant, which had thereafter refused to sell Blackmore, and he had, in consequence, sued for damages. The facts in the case were almost identical with those in the instant case. Participation in the alleged wrongful system was proved by the same class of evidence as that which the present record discloses, as appears from the statement of facts prefixed to the opinion of Mayer, *C. J.*, 277 Fed. page 696.

At pages 698-9, Judge Mayer says:

> "If, on the other hand, it be assumed (and we find it unnecessary to decide this point) that defendant's restrictive system was at all times here concerned unlawful, then the question is whether a participant in an unlawful system of doing business can, as matter of law, recover damages while at the same time participating in the unlawful system. As applied to the facts of this case, the question is whether plaintiff, as a participant after 1908, will be permitted to recover damages alleged to have been suffered during that period when during that very period for which he seeks redress he was an active wrongdoer, if defendant was a wrongdoer.
>
> The rule is tersely stated by Gray, *J.*, in *Hall* v. *Corcoran*, 107 Mass., 251, 253, (9 Am. Rep. 30) as follows:
>
> 'The general principle is undoubted that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part'. * * *

> *In Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1, especially at pages 13 *et seq.* and 19, 155 C. C. A. 531, the court pointed out, in effect, that one who is *in pari delicto* in cases such as that at bar, cannot recover, and the same principle is discussed in *Victor Talking Mach. Co.* v. *Kemeny* (C. C. A.), 271 Fed., 810, 816. See also, *McMullen* v. *Hoffman*, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117, and *Cooley on Torts* (3d Ed., 1906), vol. 1, pp. 254-261. Further citation is unnecessary because of the many cases cited in the cases referred to *supra*.
>
> The proposition of plaintiff, in effect, is that, while he joined with defendant in the illegal method of doing business after 1908 and took such advantages as sprang therefrom, he may nevertheless recover damages caused, as he claims, during the period when he and defendant were both wrongdoers. With this proposition we are unable to agree."

The above decision in *Eastern Kodak Co.* v. *Blackmore* is thus an exact precedent for this defendant and a complete authority for the position that, so long as the plaintiff was defendant's customer, it was *in pari delicto* with the defendant and subject to all the consequences which flowed from that relation.

To the same effect, *Victor Talking Mach. Co.* v. *Kemeny*, 271 Fed. 810, 816-17.

(*b*) Nor was it correct to say as stated by the Circuit Court of Appeals for the Fifth Circuit in its opinion in the instant case:

> "The jury could well have believed that the plaintiff complied with defendant's restricted terms of resale, for the reason that otherwise the plaintiff could not purchase or secure the goods necessary in the conduct of its business. The plaintiff was a small concern and its approval or disapproval of defendant's method of doing business was a matter of no moment."

It is believed that the authorities are unanimous to the effect that the mere fact that a customer needed the goods and could not get them otherwise than from an offending manufacturer, does not avail the customer as an excuse for engaging in an illegal combination, nor do such facts constitute legal coercion.

> *Radich* v. *Hutchins*, 95 U. S. 210, 213.
> *Chesebrough* v. *United States*, 192 U. S. 253, 259.
> *Dennehy* v. *McNulta*, 86 Fed. 825 C. C. A. 7th Cir. May 2, 1898.

In *Dennehy* v. *McNulta* the plaintiff purchased liquors from an illegal combination of distillers, which issued to its customers rebate vouchers by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on the condition that they purchase exclusively from the combination during that time.

On account of the control of distillery products possessed by the defendants, it was deemend a business necessity on the part of the plaintiffs to make all their purchases in that line from the distributors of the combination, or, as stated in the argument of their counsel, it "became impracticable and detrimental to their trade to buy liquors elsewhere" in the face of the monopoly (p. 827). Plaintiff sought to recover the amounts paid on certain rebate vouchers, claiming that the payment had been made under constraint or duress. Holding that no actual duress was shown, and no grounds on which to base the recovery, the Court said (p. 829):

> "At the utmost, the circumstances here assumed show an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases

> from the illegal combination, because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed."

Certiorari in this case was refused by the United States Supreme Court, 176 U. S., 683.

VI.

The amount of the profits earned by respondent during an earlier period when respondent was a participant in petitioner's unlawful acts and was, therefore, *in pari delicto* with the petitioner cannot be used as a standard by which to measure damages alleged to have been sustained by respondent in the period for which it was allowed to recover:

Victor Talking Machine Co. v. *Kemeny,* 271 Fed., 810, 819 (C.C.A., 3rd Cir. Mar., 1921). (See page 4, *supra*).

Eastman Kodak Co. v. *Blackmore,* 277 Fed., 694, 699 (C.C.A., 2nd Cir. Dec., 1921). (See page 5, *supra*).

Murray v. *Interurban Street Railway Co.,* 118 A. D. 35 (N. Y. App. Div., 1907).

McNeal v. *Farmers' Market Co.,* 43 Pa. Superior Ct. 420 (1910).

Raynor v. *Valentine Blatz Brewing Co.,* 100 Wisc., 414.

There being no other proof of damages in the record than that based upon the proof of the profits alleged to have been earned by respondent during the period

when it was a customer of the petitioner and a participant in and supporter of petitioner's alleged illegal system, there is no competent proof of damages in the record.

VII.

Petitioner did not and does not reside and was not found in the State of Georgia, nor was it at the time of the commencement of the suit, or on any previous date, transacting business in such state; hence, the attempted service of process upon the petitioner was void and the Court had no jurisdiction of the alleged cause of action.

People's Tobacco Co. v. *American Tobacco Co.*, 246 U. S. 79, 85-87.
Philadelphia & Reading Ry. Co. v. *McKibbin*, 243 U. S. 264.
Rosenberg Bros. & Co. v. *Curtis Brown Co.*, 260 U. S. 516; 43 Sup. Ct. Rep. 170.
Minnesota Commercial Men's Ass'n v. *Benn*, 261 U. S. 140; 43 Sup. Ct. Rep. 293.

VIII.

In view of the important questions involved in the case and of the necessity of avoiding conflict between different United States Circuit Courts of Appeals, as disclosed by the petition and the foregoing argument, petitioner again asks that a writ of certiorari be issued as prayed for in the petition.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 270 ~~317~~ 316

EASTMAN KODAK COMPANY OF NEW YORK,
Plaintiff-in-Error,

against

SOUTHERN PHOTO MATERIAL COMPANY,
Defendant-in-Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF-IN-ERROR.

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Supreme Court of the United States

OCTOBER TERM, 1924.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EASTMAN KODAK COMPANY OF NEW YORK, Plaintiff-in-Error, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Defendant-in-Error.	No. 270.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of the Case.

First.

This case is here on a writ of error to the Circuit Court of Appeals for the Fifth Circuit to review the final judgment of that Court (Rec., 741).

Second.

The plaintiff-in-error (defendant below) is a New York corporation, having its principal place of business in the City of Rochester, State of New

York. The defendant-in-error is a Georgia corporation, having its principal place of business in the City of Atlanta, State of Georgia. The action was brought by the defendant-in-error (plaintiff below), to recover damages claimed to have been sustained by it through breaches of the Sherman Act, (Rec. 4), alleged to have been committed by the plaintiff-in-error. The case was tried before Honorable Samuel H. Sibley, *District Judge*, and a jury at Atlanta, in the Northern Division of the Northern District of Georgia. The jury returned a verdict in favor of the defendant-in-error for the sum of $7,914.66, which being trebled, and an allowance of $5,000, attorneys' fees, having been made by the Court, a final judgment resulted in favor of the defendant-in-error and against the plaintiff-in-error for the sum of $28,743.98 (Rec. 61-62). A writ of error to review such final judgment having, on the petition of plaintiff-in-error, been issued by the Circuit Court of Appeals for the Fifth Circuit, the judgment was by such Court affirmed, and a final judgment affirming the same entered on or about December 19th, 1923 (Rec. 736). To review said final judgment last named, the writ of error herein was issued.

Third.

The right of the plaintiff-in-error to such writ of error, and the jurisdiction of this Court in this case, depend upon two grounds, to-wit:

(1)—That the plaintiff-in-error at the time of the commencement of the case did

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NOTE:—Unless otherwise stated, all references are to the printed pages of the record, and all italics are those of counsel.

not reside and was not found and had no agent in the State of Georgia, nor was it transacting business in such State, for which reason the attempted service of process upon the plaintiff-in-error was void, and the Court below had no jurisdiction in the premises.

(2)—The case is one in which the judgment of the Circuit Court of Appeals is not made final by the provisions of the Judicial Code and in which the matter in controversy exceeds one thousand dollars besides costs.

After the issue of the writ of error, the plaintiff-in-error, conceiving that there might be a doubt as to whether a writ of error was the proper remedy in the premises, filed a petition for a writ of certiorari to the Circuit Court of Appeals, to bring up the said final judgment of that Court for review in this Court because of the importance of the questions involved, and on the special ground of the necessity of avoiding conflict between two or more United States Circuit Courts of Appeal, inasmuch as an important and outstanding question in the case had been decided in one way in the Circuit Courts of Appeal for the Second and Third Circuits respectively, and in exactly the opposite way by the said Circuit Court of Appeals for the Fifth Circuit. Upon consideration, however, this Court denied said petition for a writ of certiorari.

Fourth.

THE ISSUES.

The chief issues here in controversy are as follows:

(1) Whether the Court below had jurisdiction in the premises.

(2) Whether the defendant-in-error (plaintiff below), which throughout the period during which it was a customer of plaintiff-in-error (defendant below) was an active and voluntary participant in the alleged combination, conspiracy and other alleged unlawful acts which the plaintiff-in-error was charged with conducting and committing, was not, therefore, during said period, *in pari delicto* with the plaintiff-in-error, and whether, therefore, the defendant-in-error was not, and is not, barred from using as a standard by which to measure damages alleged to have been sustained by it in the period for which it was allowed to recover, the amount of profits claimed to have been earned by it during an earlier period when it was so *in pari delicto*, and whether, therefore, the record does not fail to present any legal proof of damages.

(3) Apart from the above, whether the record does not fail to present any such proof of damages as is required by the rulings of this Court in order to sustain a recovery.

(4) The defendant-in-error having failed to prove affirmatively that the refusal of plaintiff-

in-error to sell to defendant-in-error at dealers' discounts after April, 1910, was made for a monopolistic reason, whether such refusal constituted a legal wrong which could form the basis of recovery by defendant-in-error.

Fifth.

THE FACTS.

I.—As to the Statute.

The suit is brought under the Sherman Act, Section 7, which provides that a suit authorized by such section may be brought "in the district in which the defendant resides or is found." Section 4 of the Clayton Act provides that such a suit may be brought "in the district in which the defendant resides or is found or has an agent." Section 12 of the same Act provides that such a suit may be brought against a corporation in any district wherein the defendant "may be found or transacts business," and that "all process in such cases may be served in the district of which it (the defendant) is an inhabitant, or wherever it may be found."

II.—*As to Jurisdiction.*

In the case at bar, process was first attempted to be served upon the agent of a local concern, which in no way represented the plaintiff-in-error. The service, however, was abandoned, having been adjudged invalid (Rec. 659), and a new service was subsequently attempted to be made at Rochester, New York, upon the treasurer of the plaintiff-in-error, which appeared specially, traversed the return, entered a plea to

the jurisdiction, and moved to quash the return and set aside the attempted service (Rec. 656). The issues thus raised having been separately tried, the Court overruled the plea, traverse and motion to quash, with the usual leave to the plaintiff-in-error to plead to the merits (Rec. 659).

All the testimony and other proofs taken and offered on the trial of the issues raised as to jurisdiction and service, and the judgment of the Court thereon and the exceptions of the plaintiff-in-error to such judgment, are presented in a separate bill of exceptions (Rec. 665-721) duly signed by Hon. William T. Newman, United States District Judge, and filed July 21st, 1916. No objection is raised here to the fact that process was attempted to be served in Rochester, apart from our claim that the suit could not be maintained by reason of the facts presented by such bill of exceptions, which are as follows:

The plaintiff-in-error never had in the State of Georgia any office or place of business, or branch house or plant for the manufacture of products, or warehouse or storage house for the storage or display of its goods, or any property of any character or description connected with its business; nor for at least four years before the commencement of the action had it had any agent in that State (Rec. 665-6, 677-8, 693, 699). It has never registered in Georgia as a nonresident corporation for the purpose of doing business in that State (Rec. 699). The plaintiff-in-error's business with Georgia at the time of the commencement of the action was, and has always been, entirely interstate and was

conducted in the following manner: several of its travelling salesmen were assigned to a number of states, including Georgia, but not more than one of these salesmen at a time (Rec. 681) visited that State. Such visits took place about four times a year, or perhaps oftener in the larger cities, at what were evidently irregular intervals, and on such visits the salesman solicited orders from dealers. These orders were always transmitted to the home office of the plaintiff-in-error at Rochester, New York, or to its branch office in New York City, where the orders were passed upon as to their credit and were accepted or rejected (Rec. 669, 677, 681-2, 690, 700). Mr. Ames, who had been for ten years sales manager of the Eastman Kodak Company of New York and was in charge of all matters relating to its sales (Rec. 676), testified on cross-examination as follows (Rec. 681-2):

> "Q. How long have you had traveling salesmen in Georgia?
>
> A. We do not have at any time a traveling salesman in the State of Georgia continually, but Georgia is a part of the territory of the travelling salesmen.
>
> Q. Well, how often do they go into the State of Georgia, how frequently in the year?
>
> A. We have not had a salesman in Georgia for the past six months.
>
> Q. Before that time how often had they been there?
>
> A. About four trips a year. In the larger cities, perhaps more often.
>
> Q. How many salesmen would you have in Georgia at any one time?
>
> A. One."

The plaintiff-in-error also received orders by mail and filled its orders either by freight or ex-

press, sometimes from Rochester and sometimes from its branch offices at New York or Chicago. The plaintiff-in-error collected its bills for goods sold on credit from the main office at Rochester, these bills being paid by check or draft and no collectors being sent into the State of Georgia. (Ames, Rec. 677.) None of the salesmen was a resident of Georgia or maintained an office in that State (Rec. 678).

Other employees of the plaintiff-in-error known as "demonstrators" were also assigned to a number of states including Georgia, and visited that State at irregular intervals, their duty being to exhibit and explain the use of Eastman Kodak goods to consumers, chiefly professional photographers and mercantile concerns using photographic supplies (Rec. 668, 679), and to show their superiority (Rec. 668-9, 679). These demonstrators did not maintain an office in Georgia (680), nor did they solicit orders, but if, as happened occasionally, a photographer so requested, they would, purely as an accommodation to him, transmit an order from him to a dealer: but they did not call on dealers, or sell any goods or take any orders for the Eastman Kodak Company (Rec. 669-670, 683, 686-7). Only two, or possibly three, demonstrators covered the territory of which the State of Georgia was a part (Rec. 682, 684, 719).

Neither salesmen nor demonstrators had any authority to collect bills or to receive payment in money, checks, drafts or notes, (Rec. 677), or to make sales (Rec. 677, 681, 690), nor is there any evidence that they did so, nor that they had any authority to make any

contract on behalf of the Company or extend credit for it, or did either.

The Glen Photo Supply Company mentioned in the record and in the brief of defendant-in-error was merely a customer of plaintiff-in-error, which did not own any of the stock of the Georgia company, nor distribute merchandise or do any other acts through that company (Rec. 698-9).

The foregoing represents the essential evidence contained in the special bill of exceptions relating to the trial of the issues of jurisdiction and service.

> "Each bill of exceptions must be considered as presenting a distinct and substantive case; and it is on the evidence stated in itself alone that the court is to decide."
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> *Jones* v. *Buckell*, 104 U. S. 554-56.
> *Mound Coal Co.* v. *Jeffrey Mfg. Co.*, 233 Fed. 913, C. C. A.—4th Cir. 1916.

III.—*The defense that the plaintiff was in pari delicto.*

(1) Coming now to the merits of the action, it appears that the Eastman Kodak Company is and has for many years been engaged in the manufacture of general photographic supplies, selling them wholly to retail dealers.

Prior to the commencement of this action, a suit had been brought by the United States against the plaintiff-in-error and others for alleged violations of the Anti-Trust Acts of the United States, which latter suit terminated in a decree adverse to the plaintiff-in-error (Rec. 542, 545). Down to the month of November,

1911, as to goods manufactured by it under secret processes (Rec. 260, 640), and down to the month of June, 1913, as to goods covered by its Letters Patent (Rec. 361, 644), the plaintiff-in-error (defendant below) carried on its business under a system whereby such goods were sold by it under restrictive contracts designated as "terms of sale," according to which such goods might be resold by the customer only at prices fixed by plaintiff-in-error, and the customer also agreed not to handle goods which competed with the restricted goods so sold to him (Rec. 23). In June, 1913, the plaintiff-in-error abandoned its restrictive system entirely (Rec. 361).

(2) In 1901 defendant-in-error (plaintiff below) became a regular customer of the plaintiff-in-error (defendant below), fully accepted its restrictive system (Rec. 204-5), repeatedly approved of it (Rec. 204-5, 228-9), contracted to maintain it (Rec. 211), and when called to account for sundry violations of the terms of sale, apologized, promised future compliance, reaffirmed its intention to comply with the terms of sale in all respects (Rec. 230, 231), and reported violations by other dealers (Rec. 215-18, 223-4), thus voluntarily becoming and continuing for over eight years *in pari delicto* with the plaintiff-in-error.

(3) To state in more detail the extent of the participation of defendant-in-error in the system pronounced illegal, the following facts appear: On September 17th, 1901, the plaintiff-in-error wrote to the defendant-in-error (Rec. 203-

4) acknowledging receipt of an order from the jobber and enclosing a copy of the then current terms of sale and various other circulars stating the terms and conditions under which the plaintiff-in-error sold its goods. The terms of sale thus enclosed were those effective May 1st, 1901, printed at pages 591-4 of the record.

(a) The conditions of these terms of sale were well understood by the defendant-in-error from the beginning, for on October 4th, 1901, (Rec. 204-5) it wrote to the plaintiff-in-error:

> "We have before us your valued favor of the 2nd inst. and replying will state that the *terms and discounts are satisfactory and fully understood.*"

And again on October 24th, 1902 (Rec. 211):

> "As you are well aware of the fact that *we are under contract with you to sell your goods, and yours only.*"

And again on November 22nd, 1902 (Rec. 215):

> "Is it right, according to *our restricted contract with you,* that these people receive the dealers' discount?"

Also, to the same effect, on March 17th, 1903, (Rec. 217), April 9th, 1903, (Rec. 220), November 20th, 1903, (Rec. 223), and December 11th, 1903 (Rec. 224).

(b) On several occasions when the defendant-in-error had been called to account for some slight violation of the terms of sale, it ex-

pressed contrition and gave assurance of reform (Rec. 226, 230).

(c) On October 19th, 1909, referring to the purchase by the plaintiff-in-error of the popular Artura paper, theretofore owned and marketed by a competing concern, the defendant-in-error wrote heartily approving of the purchase (Rec. 231).

(d) On numerous occasions defendant-in-error reported to plaintiff-in-error violations by other dealers of the defendant's terms of sale, or injurious acts by those not customers of the defendant and claiming to be such, all of these instances involving espionage. Thus in September, 1902 (Rec. 205-6), November 22nd, 1902 (Rec. 215), February 21st, 1903 (Rec. 216), March 17th, 1903 (Rec. 217-18), November 20th, 1903 (Rec. 223), December 11th, 1903 (Rec. 224), December 18th, 1905 (Rec. 227), and November 22nd, 1909 (Rec. 232-233). Goodhart, the secretary and treasurer of the plaintiff, (Rec. 148) testified (Rec. 250) under cross-examination:

> "Q. You wrote all these letters? Where you would catch a fellow violating the terms of sale, you would notify Eastman Kodak Company at once?
>
> A. Yes. We wanted to sell all the goods we could. We were looking out for the Southern Photo Material Company and we wanted to get what business we could and sell all the goods we could."

(e) Throughout a large part of the period of its relations with the plaintiff-in-error, and in order to obtain a special credit equal to a 12% discount, defendant-in-error by its authorized officers (Rec. 235) signed what were known as

"credit memorandums," of which approximately one hundred and sixty are in evidence dating from October 20th, 1901, to November 20th, 1907, (Rec. 602-629), from the Eastman Kodak Company itself and its subsidiaries, each of which certified in substance that the defendant-in-error during the four preceding months had sold only goods purchased from plaintiff-in-error and at the prices prescribed by the terms of sale, with permitted exceptions. The various credits received by the defendant-in-error upon signing these so-called credit memorandums aggregated, in the case of those set out in the record, not less than $10,767.31 (Rec. 235). Credit memorandums were not used by plaintiff-in-error after January 1st, 1908 (Rec. 235).

(f) Copies of the various terms of sale issued from time to time by the plaintiff-in-error are printed in the record at pages 571-594, 597-600 and 640-651. Of all of these, defendant-in-error was fully informed and approved of the same, and from time to time agreed to conform to them (Rec. 205, 219, 226, 230). Thus, on April 6th, 1903 (Rec. 219), defendant-in-error wrote:

> "We are in receipt of your valued favor of the 4th inst. authorizing the sale of Kresco paper. *We will only sell this paper where necessary to kill non-trust products.*"

Mr. Goodhart, treasurer of the plaintiff, on cross-examination testified (Rec. 250):

> "Q. You knew what the terms (of sale) were?
>
> A. Oh, yes, we knew what the terms (of sale) were."

IV.—*The Ansco Contract.*

In March, 1910, the defendant-in-error entered into an exclusive agreement with the so-called Ansco Company, one of the principal competitors of plaintiff-in-error, (Rec. 241-5), by the terms of which agreement defendant-in-error *undertook not to sell any but Ansco goods at wholesale, and not to push other than Ansco goods at retail, and to prefer Ansco goods at all times and in all ways over all other goods.* Shortly thereafter plaintiff-in-error declined to sell the defendant-in-error any further, except at full retail prices (Rec. 165-169).

Entering upon the performance of its Ansco contract (Rec. 241-245), defendant-in-error placed a large initial order with the Ansco Company (Rec. 246), and between April 1st, 1910, and April 1st, 1911, bought Ansco goods to the amount of $50,437.26 (Rec. 246). Its largest purchase of Eastman goods ever made in one year had been $26,364.87 in 1908 (Rec. 236). Thereafter its purchase of Ansco goods increased rapidly up to $104,108.89 (Rec. 246), in the fiscal year 1915-16.

V.—*Basis of alleged cause of action.*

The alleged cause of action is based upon the claim of defendant-in-error that it is entitled to recover for damages claimed to have been sustained in its business by being prevented from purchasing the goods of plaintiff-in-error at dealers' discounts, such damages to cover the period from April 5th, 1910, to the beginning of

the action, about February 16th, 1915. Under the ruling of the trial court, damages were allowed on the basis of the *net* profits which the defendant-in-error estimated it would have made if allowed to continue the sale of Eastman goods; using, however, as the sole basis for such estimate, the actual *gross* profits claimed by the defendant-in-error for the period prior to April 5, 1910, during which period the defendant-in-error was *in pari delicto* with the plaintiff-in-error.

VI.—*Insufficiency of proof of damage.*

(1) The only evidence offered to sustain defendant-in-error's claims for damages is the following:

(a) Evidence as to rates of gross discounts allowed to the defendant-in-error (plaintiff below) by the plaintiff-in-error (defendant below) on individual items of merchandise; as to the amounts of the gross sales of some of these made by defendant-in-error while still a customer of plaintiff-in-error; and as to the expenses not of the sale of such items but of the entire business of defendant-in-error; which evidence was clearly inadmissible to prove damages not only because the defendant-in-error was *in pari delicto,* but because such evidence did not show the separate cost of handling Eastman goods (which formed only a small part of the total sales of defendant-in-error), nor of any item of them, nor the net profit on such goods made by defendant-in-error.

(b) The purely speculative testimony of plaintiff's treasurer, Goodhart, that plaintiff (defendant-in-error) could have continued to sell the Eastman line, in spite of its handling of the Ansco line (Rec. 261), and that dealers wishing Eastman goods would order all their goods from other concerns which handled the Eastman line (Rec. 302), which last testimony obviously must have been hearsay (Rec. 303); and also Goodhart's testimony several times repeated that the defendant-in-error, after it had taken on the Ansco line, could have handled Eastman goods at no more than 5 per cent. additional cost (Rec. 191-92). Defendant-in-error did not, in fact, sell Eastman goods after April, 1910, and Goodhart could only guess how much of them he would have sold. The 5 per cent. estimate of increased cost is purely a guess and is negatived by the testimony of Mr. Haight (Rec. 379), who said:

> "Q. Now, with reference to Artura and Azo paper, in 1910, after the Southern Photo Material Company had taken over the sale of the Ansco product, will you tell us from your knowledge of the photo stock business whether it was possible for that company to sell Artura and Azo paper at a selling cost of only five per cent?
>
> A. It was not.
>
> Q. Why?
>
> A. Why, the cost of handling it exceeded that materially. The investment in the stock, the deterioration in the stock that would have to be returned, and the general cost of handling it would far exceed five per cent.
>
> Q. Is there any way of determining what the additional cost would have been over and above the rest of the business that they were

doing, of selling the additional amount of Artura and Azo paper?

A. I don't think it could be accurately determined."

Mr. Haight had, for eleven years, been in charge of a large Eastman stock house in Boston, with an annual volume of business varying from $252,000 to $360,000 a year, and had had an immense experience in all branches of the business of selling photographic goods (Rec. 347). He further testified (Rec. 389) that in his experience the ratio of the cost of selling to the amount of sales remained constant. In other words, the expenses increased as the total sales increased.

Of course, the losses of defendant-in-error, if such there were, arising from its inability to sell photographic goods other than those of Eastman manufacture, because, as claimed, customers wished to buy a complete line from a single dealer, are too remote and furnish no basis for a recovery; also defendant-in-error could have bought Eastman goods at list prices and thus have limited its loss, since these goods would on its own theory have then enabled defendant-in-error to sell its other lines.

Frey & Son v. *Welch Grape Juice Co.*,
240 Fed. 114, p. 117, at bottom.

(2) Much of the evidence of the defendant-in-error flatly contradicts its own claim as to damages.

(a) The total business done by defendant-in-error (while still an Eastman customer) deducting costs and expenses from total sales, showed a net loss in 1908 of $893.73, and in 1909, a net

loss of $2,452.70. (Rec. 235-6, 302, and table page 21). On the other hand, in 1910, its first year of handling the Ansco goods, the defendant-in-error made a clear net profit of $2,932.64 (Rec. 239), and in 1911, a profit stated (Rec. 313), as $6,380, but which on comparison with the other figures, appears to have been slightly below $6,000 (Rec. 237, 313). A table is appended (page 21), in which the various figures of the purchases, sales, costs, expenses, net gains and losses, of defendant-in-error, so far as given in the testimony, are arranged.

(b) The claims made by defendant-in-error to a constantly increasing volume of sales of Eastman goods while it remained an Eastman customer, and to a probable progressive increase in similar sales subsequent to that period, had it continued to handle Eastman goods, are shown to be without foundation by the figures given by Goodhart. (See table, page 21). From these it appears that the *purchases* of Eastman goods made by defendant-in-error in 1908, were $26,364.87 (Rec. 236), and in 1909 only $20,993.27 (Rec. 237) and that its *sales* of Eastman goods ran as follows (Rec. 212):

1906	$34,494.97
1907	35,208.48
1908	29,196.06
1909	32,258.04

So far as these figures prove anything, they show that the business of defendant-in-error in Eastman goods was on the decrease before the interruption. This, indeed, is practically ad-

mitted. On the other hand, defendant-in-error jumped immediately into a much larger, and, as shown above, a more profitable business, by taking over the Ansco line. Thus, its purchases of Ansco goods for the years beginning 1910 were as follows (Rec. 246):

1910	$ 50,437.26
1911	51,565.36
1912	76,412.47
1913	88,876.18
1914	74,940.16
1915	104,108.89

(c) There is not a word of testimony to show that defendant-in-error sustained any damage through the acquisition by the Eastman Company of various concerns which had theretofore made photographic paper or other goods. On the contrary, Eastman dealers gained largely by the advertising done by the Eastman Company and by the greater vogue which it gave to the acquired products. Thus Goodhart (Rec. 322-3):

> "Q. But did you sell more of them (acquired products) by reason of the fact that you were in the Eastman combination?
>
> A. *Like Artura,* when we got that, *we sold worlds of it,* but we didn't have it prior to 1910.
>
> Q. When Eastman would buy these things, and take them into their line, did that hurt your business, or help it, or leave it the same?
>
> A. They advertised it extensively and created a demand for the goods."

Moreover, as shown elsewhere in this brief (p. 58), and as expressly conceded by the de-

fendant-in-error (Rec. 322), *all the products of the companies purchased were immediately incorporated into the Terms of Sale,* and were accepted by the defendant-in-error, as were other Eastman products, with an oft-ratified agreement to sell them under the conditions laid down in the terms of sale. Nor did the acquisition of other lines by Eastman change the system under which these had previously been sold. Goodhart (treasurer of defendant-in-error) says (Rec. 323):

> "A. *Every other manufacturer had restricted prices, also Folmer & Schwing, and others, prior to the time that Eastman took them over. It was the policy of practically all manufacturers to help the dealers to make as much money as possible.*
>
> Q. Trying to uphold your profits?
>
> A. Every manufacturer tries to do that."

ar	Purchases E. K. Goods		Sales E. K. Goods (Rec. 212)		Purchases Ansco Goods Apr. 1-Apr. 1		Total Cost All Goods Sold		Total Sales		Total Expenses		Apparent Net Loss or Gain	
16			34,494.97	*(212)					90,404.65	*(313)	26,680.00	*(289)		
17			35,208.48	(212)			73,741.90	*(289)	105,205.13	(289)				
18	26,364.87	*(236)	29,196.06	(212)			68,269.90	(236)	101,682.47	(235-6)	34,306.30	(236)	— 893.73	(loss)
19	20,993.27	(237)	32,258.04	(212)			59,044.33	(236)	91,876.00	(236)	35,284.37	(302)	— 2,452.70	(loss)
20	8,835.52	(265)	13,367.91	(212)	50,437.26	*(246)	87,089.99	(237)	119,339.44	(237)	36,240.75	(237)	2,932.64	*(239)
21					51,565.36	(246)	95,465.11	(237)	141,074.72	(237)	39,762.88	(313)	5,846.73	(237, 313)
22					76,412.47	(246)			149,432.94	(300)	50,000.00	(313)		
23					88,876.18	(246)			164,293.84	(300)				
24					74,940.16	(246)			162,268.06	(300)	35,452.45	(302)		
25					104,108.89	(246)			184,000.00	(317)				

ferences in parenthesis are to pages of Record.

Specification of Errors.

See the amended Assignment of Errors (Rec. 742-748).

It is respectfully submitted that the Circuit Court of Appeals erred in the following, among other, particulars:

(1) In affirming and not reversing the judgment of the District Court for the sum of $23,743.98 and $5,000 attorney's fees entered on September 30th, 1922, in favor of the defendant-in-error and against the plaintiff-in-error, and in not remanding said cause to the District Court for a new trial or for a dismissal for lack of jurisdiction. (See Assignment of Errors Nos. 1 and 2, Rec. 742).

(2) In not reversing said judgment because of the error of the District Court in refusing to quash the service of process and the pleas to the jurisdiction based thereon filed by plaintiff-in-error in said cause and to dismiss the cause for the reason that the District Court had no jurisdiction in the premises, because the evidence shows that the plaintiff-in-error did not reside in and was not an inhabitant of the Northern District of Georgia; was not found therein; had no agent therein subject to legal service of process; and did not transact business within said District of the character necessary to subject the plaintiff-in-error to the service of process upon it. (See Assignment of Errors No. 3, Rec. 742; Separate Bill of Exceptions Rec. 676-692).

(3) In refusing to reverse the judgment of the District Court for its error in overruling the objections to and admitting in evidence the testimony of the witness E. H. Goodhart as to gross sales of Eastman goods claimed to have been made, and as to gross discounts thereon claimed to have been received, by defendant-in-error prior to April 5, 1910, and also the testimony of said witness to the effect that the additional cost to the defendant-in-error of handling Eastman goods after April, 1910, would have been 5% of the selling price of such goods, because

(a) The business of defendant-in-error (plaintiff below) was conducted as a single unit with respect to expenses and there was no segregation of, and no way of ascertaining, the separate expenses of handling Eastman goods, which were only a part of the entire business of the defendant-in-error;

(b) Because the assumption that defendant-in-error could have sold the same quantity of Eastman goods after as before April, 1910, disregards the changed conditions due to the taking on by defendant-in-error of the Ansco line;

(c) Because such testimony of the witness Goodhart was purely speculative and guess work and not founded on any experience or knowledge derived from experience.

(d) Because defendant-in-error, by conforming to the terms of sale, became *in pari delicto* with plaintiff-in-error, so that the business of

defendant-in-error in Eastman goods before April, 1910, may not be used as a standard by which to measure profits alleged to have been lost by defendant-in-error after that date;

(See Assignment of Errors No. 4, Rec. 743; Bill of Exceptions Rec. 108-111).

(4) In refusing to reverse the judgment of the District Court for its error in admitting over objections the testimony of the witness Goodhart to the effect that the inability of the defendant-in-error to supply Artura paper after April, 1910, caused its customers to order also other materials elsewhere and thus decreased the sales of defendant-in-error (because this was an argumentative conclusion based on what was admittedly hearsay). (See Assignment of Errors No. 5, Rec. 744; Bill of Exceptions 111-114).

(5) In not reversing the said judgment on the ground that the District Court erred in denying the motion of the plaintiff-in-error to have a verdict directed in its favor, because

(a) Prospective profits are too remote and speculative unless capable of ascertainment by comparison with previous results of an established business. From September, 1901 to April 4th, 1910, defendant-in-error was an Eastman dealer and participated in all the advantages of the business system of plaintiff-in-error, approved of the same and assisted in enforcing it; and if such system was unlawful, defendant-in-error, even if it could not secure the goods of plaintiff-in-error without complying with the latter's terms of sale and conforming to its said system, was

in pari delicto with the plaintiff-in-error; hence, the profits of defendant-in-error made in such business cannot be used as a standard from which to determine the prospective profits of defendant-in-error after April 4th, 1910, and there was, therefore, no rule by which such profits could be measured.

(b) The business of defendant-in-error as a whole was more profitable after April 4th, 1910, than it had been previously, and, therefore, if the results of such business before such date are to be used as a standard of comparison with subsequent business, the proof shows no damage suffered by defendant-in-error.

(c) The act of defendant-in-error in taking on the Ansco products under a preferential contract justified plaintiff-in-error in its refusal longer to sell its products to the defendant-in-error.

(d) In the absence of proof that plaintiff-in-error had been conducting its business unlawfully, it had a right to refuse to sell its goods to defendant-in-error with or without reason.

(e) The evidence failed to show any damages sustained by defendant-in-error as a result of acts of plaintiff-in-error, because, the expenses of the business of defendant-in-error, prior and subsequent to April 4th, 1910, having been pooled into one expense account, no legal basis was proven for a reasonably correct estimate of the amount of actual net profits, if any, made or which might have been made by defendant-in-

error on the Eastman goods sold by it. (See Assignment of Errors No. 6, Rec. 744; Bill of Exceptions, Rec. 121-125.)

(6) In not holding as a matter of law that the defendant-in-error for the reasons given above was *in pari delicto* with the plaintiff-in-error and that, as a result of such relations, the experience of defendant-in-error in such business could form no basis of calculation of any loss of profits claimed to have been sustained by the defendant-in-error as a result of the termination of such relations. (See Assignment of Errors No. 7, Rec. 745; Bill of Exceptions, Rec. 135, 139, 142-4).

(7) In refusing to reverse the said judgment because of the error of the District Court in refusing and failing to charge the jury as requested by the plaintiff-in-error, and in erroneously charging the jury, as follows:

In refusing to charge as follows:

(a) The defendant-in-error could not segregate its business transactions and divide them up into particular commodities and undertake to prove that profits were made on such special commodities separate and distinct from the volume of the general business of defendant-in-error, inasmuch as the business of defendant-in-error was conducted with no separation in the departments and no apportionment of the expenses of handling the different commodities, so that any effort to separate the profits or losses of the defendant-in-error as to any particular

commodity would involve too much speculation to form a basis of a lawful verdict and judgment in the case. (See Assignment of Errors No. 8, Rec. 745; Bill of Exceptions, Rec. 131-2.)

(b) Gross profits either on the business as a whole or upon any particular commodity or class of commodities bought and sold in connection with said business, are not recoverable in this case and cannot be used by you as a criterion by which to measure damages unless the evidence accompanying such proof of gross profits is sufficient to enable you with reasonable certainty to arrive at the net profits for any given period of time under investigation. (See Assignment of Errors No. 8, Rec. 745, at p. 746; Bill of Exceptions, Rec. 132).

This refusal was error because there was no proof of net profits except the mere estimate of the witness.

(c) The mere fact that the plaintiff had an urgent need for the defendant's goods, in order to keep up his stock and continue in trade, and that it was a business necessity for the plaintiff to conform to the defendant's system and to carry out the provisions of the terms of sale because the plaintiff feared that disastrous results to his business would follow if he did otherwise—if the jury find that to have been the fact—did not excuse the plaintiff for joining in an unlawful combination. If, therefore, the jury find that the defendant's sale system violated the Anti-Trust Acts and that the plaintiff conformed and acquiesced in the same and carried on his business in accordance with the terms of

sale—even though to do so was such a business necessity, then any profits which the evidence may show the plaintiff realized from the business thus transacted with the defendant, must be disregarded by you in this case. (See Assignment of Errors No. 8, Rec. 745, at p. 746; Bill of Exceptions, Rec. 134.)

In charging the jury as follows:

(d) On the other hand, if he (the plaintiff) did nothing more than deal with the trust by the use of its goods on the terms that were prescribed to him, not in a desire to help towards the building up of the monopoly or seeking benefit from it, but because he needed the goods and that was the only way he could get them, then he bears to that extent, the relation of buyer, and would not be, to that extent, *in pari delicto,* and could complain if after ceasing his dealing with the trust he was hurt, and suffered financial loss. (See Assignment of Errors No. 8, Rec. 745, at p. 747; Bill of Exceptions, Rec. 144-5.)

In refusing to give the following or substantially identical instructions:

(e) If the jury should find that the defendant's system of doing business, as set forth in its terms of sale and as carried out in accordance therewith, was a violation of the provisions of the Anti-Trust Acts, and if they should further find that the plaintiff not only conformed to the said system and complied with its requirements under the terms of sale, but assisted actively in enforcing the same against other dealers, by giving information as to violations by such dealers of the terms of sale, and voluntarily assisted defendant

to secure evidence of such violations, then I charge you that you must find that the plaintiff became a party to such unlawful system and a violator of the provisions of the Anti-Trust Acts, in common with the defendant, and any profits made by him, while such a member of such combination or conspiracy, if you believe any such profits were made, cannot be used in any manner by you in arriving at any alleged loss of profits claimed by the plaintiff in this case. (See Assignment of Errors No. 8, Rec. 745, at p. 747; Bill of Exceptions, Rec. 136).

(f) The defendant is not obliged to place its goods in such a position that they will be discredited in comparison with the goods manufactured by its competitors nor is defendant compelled to place its products in the hands of a dealer who has a contract to give preference to sales of similar products of competing manufacturers over the products of the defendant. The refusal of the defendant to sell its goods to the plaintiff to be thus placed in this disadvantageous position in competition with similar products marketed by competing manufacturers would not be an actionable wrong against the plaintiff, notwithstanding the defendant had been adjudicated to have violated the Anti-Trust Act in the particulars set forth in the evidence. (See Assignment of Errors No. 8, Rec. 745, at p. 748; Bill of Exceptions, Rec. 140-1).

BRIEF OF ARGUMENT.

POINT I.

The plaintiff-in-error, Eastman Kodak Company of New York, at the time of the commencement of the suit and for a long time prior thereto, did not reside in and was not found in the State of Georgia, nor had it an agent in, nor was it transacting business in, that State. Hence, the attempted service of process upon the plaintiff-in-error, whether in the State of Georgia or in the State of New York, was void and the Court below had no jurisdiction in the premises.

1. The plaintiff-in-error is a New York corporation, and any claim that it was "found" in the State of Georgia or had an agent there has practically been abandoned. The facts under this point are stated above at pages 5-9, and upon them we submit that the plaintiff-in-error was not transacting business in the said state in such a way as would subject it to service of process in a suit brought in a Federal district within that state.

> *People's Tobacco Company, Ltd.* v. *American Tobacco Company,* 246 U. S. 79.

That case was brought under the Sherman Act in which the words "transacts business" do not occur, but presumably this Court would not have decided otherwise had the Clayton Act been in force when the suit was begun, for Mr. Justice Day expressly stated that the words "resides or is found" as used in the Sherman Act were the equivalent of "car-

rying on (i.e., transacting) business" in the district (p. 84). Holding that the Court had no jurisdiction over the defendant, Mr. Justice Day says, at pp. 85-6:

> "It is true, as found by the District Court, that at the time of the service, and thereafter, the American Tobacco Company was selling goods in Louisiana to jobbers, and *sending its drummers into that State to solicit orders of the retail trade, to be turned over to the jobbers,* the charges being made by the jobbers to the retailers. It further appears that these agents were not domiciled in the State, and did not have the right or authority to make sales on account of the defendant company, collect money, or extend credit for it."

The facts thus stated are practically identical with those in the instant case. Here it appears that plaintiff-in-error sent demonstrators, to visit photographers in Georgia and explain Eastman goods to them (Rec. 679, 684, 686-7); and also travelling salesmen who merely solicited orders (Rec. 669, 677, 681-2, 690, 700). Neither salesmen nor demonstrators had any authority to collect bills nor any authority to, nor did they, receive payment in money, checks, drafts, notes or otherwise, or make sales (Rec. 677, 681, 690). In the *People's Tobacco Co.* case (supra), Mr. Justice Day said at p. 87, as to such employes:

> "As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that State, as above detailed, *the agents having no authority beyond solicitation,* we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the

> corporation to the local jurisdiction for the purpose of service of process upon it. *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S., 264, 268."

And at p. 87, he said further, in distinguishing *International Harvester Co.* v. *Kentucky*, 234 U. S. 579:

> "In that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State."

It is clear, therefore, that plaintiff-in-error was not transacting business in Georgia in the required sense.

The rule that the mere solicitation of orders is not enough to constitute that doing or transacting of business which subjects a foreign corporation to local jurisdiction for the purpose of service of process upon it, has been reiterated in later decisions of this Court.

> *Minnesota Commercial Men's Association* v. *Benn*, 261 U. S. 140.
>
> *Davis, Director General of Railroads, as Agent, etc.*, v. *Farmers' Co-operative Equity Company*, 262 U. S. 312.

2. Also, other Courts of high standing, including those of the State of Georgia, following the decision of this Court in *People's Tobacco Co.* v. *American Tobacco Co., supra,* have accepted the same doctrine.

> *Vicksburg, Shreveport, & Pacific Ry.* v *De Bow,* 148 Ga. 738, 744-45.
>
> *Southeastern Distributing Co.* v. *Nordyke & Marmon Co.,* 125 S. E. 171, Sup. Ct. of Ga., decided October, 1924.
>
> *Chase Bag Co.* v. *Munson Steamship Line,* 295 Fed. 990, 994, Court of Appeals, Dist. of Columbia, decided February, 1924.
>
> *Holzer* v. *Dodge Brothers,* 233 N. Y. Court of Appeals 216, 222.

In *Southeastern Distributing Co.* v. *Nordyke & Marmon Co., supra,* the Supreme Court of Georgia refused to follow the decision of the Circuit Court of Appeals in the instant case, and in the case before it held (citing *People's Tobacco Co.* v. *American Tobacco Co., supra*) that the defendant in that case was not doing business in the State in the required sense, although the defendant, a foreign corporation, which sold its goods to a Georgia corporation for distribution, had a district representative in Georgia whose duties were as follows (p. 176):

> "He does not sell any cars for the defendant. He visits distributors and dealers from time to time within this territory. He assists them in every way possible in selling

their cars purchased from the defendant. He demonstrates to the prospective buyer from such distributors or dealers their Marmon cars. He instructs such distributors and dealers in the art of salesmanship of Marmon cars. He will sell (meaning to take orders for) such cars belonging to demonstrators or dealers and turns over the orders therefor to such demonstrators or dealers and keeps up with the business done by demonstrators and dealers and makes reports thereon to the defendant at its home office. He sees that distributors and dealers render proper service to the users of Marmon cars purchased from them in order that such users may be satisfied with their cars."

The facts in this Georgia case were much stronger than any which could possibly be pieced out in the instant case.

3. The case of *Northwestern Consolidated Milling Co.* v. *Massachusetts*, 246 U. S. 147, 155, usually cited as *Cheney* v. *Massachusetts* (which was decided on the same day as *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79) is clearly distinguishable from the case at bar. It appears from the report of that case in the Massachusetts Court (218 Mass. 558, 575) that:

> *"The major part of the petitioner's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in soliciting orders from domestic retailers."*

In the case at bar, no orders were solicited by the demonstrators of the plaintiff-in-error (Rec. 683) though, as an accommodation to photogra-

phers (Rec. 687), they sometimes received orders to be turned over to the dealer. The number of such orders was nominal (Rec. 683).

4. The basis of jurisdiction is not in the least strengthened by adopting the machinery provided by the Clayton Act (Section 12) for service of process at the home office of the Company. Where service is so made, jurisdiction must rest upon two elements: (1) "transaction of business" by the defendant within the territorial limits of the Court, and (2) appropriate service upon an authorized agent of the defendant in the district of which the defendant is an inhabitant or where it is found (Clayton Act. Sec. 12). The absence of either element defeats the jurisdiction of the Court.

5. That Congress, by inserting in Section 12 of the Clayton Act after the words "may be found" the additional words "or transacts business," did not intend to broaden the section but merely to make explicit what this Court had already decided, is shown by the legislative proceedings, (*Duplex Co.* v. *Deering,* 254 U. S. 443, 474-5), a summary of which proceedings is appended hereto as "Appendix I," and by the following citations: We have already noted the language of this Court in the *People's Tobacco* case, defining the words "resides or is found" as the equivalent of "carrying on business," (246 U. S. 84), but in an earlier case, *St. Louis Southwestern Railway Co. of Texas* v. *Alexander,* 227 U. S. 218, decided February 3rd, 1913, more than a year before Mr. Clayton introduced his bill into the House, Mr. Justice Day, at p. 226, said:

> "A long line of decisions in this Court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is *transacting business* in that district to such an extent as to subject it to the jurisdiction and laws thereof."

Citing numerous cases.

6. *Frey and Son, Inc.* v. *Cudahy Packing Co.*, 228 Fed. 209, and the decision of Newman, J., in the instant case (234 Fed. 955), were both rendered long before the decision of this Court in *People's Tobacco Co.* v. *American Tobacco Co., supra.* Moreover in the *Frey* case it was shown that the defendant carried in a warehouse in the state in question a permanent stock of goods of a value as high as $10,000, which goods, upon orders from the defendant, the warehouse company would deliver to those to whom the defendant had sold the same (228 Fed. 212). Also, other facts appeared, tending to show that the defendant was doing business in the state within the authorities. The case of *General Investment Co.* v. *Lakeshore & M. S. R. Co.*, 260 U. S. 261, does not help the plaintiff-in-error. The comparison which the Court makes in that case is between Section 51 of the Judicial Code and Section 12 of the Clayton Act (p. 279), and not at all between any language in the Sherman Act and that in the Clayton Act. This case of *General Investment Company* v. *Lakeshore & M. S. Ry Co.*, is in fact an authority for the plaintiff-in-error, since in that case it was held that the New York Central Railroad Co. transacted no business in Ohio, although tickets over its road

were sold at a ticket office in Cleveland by an agent of the Lake Shore Company. Mr. Justice Van Devanter closed the discussion, p. 268 of that case, by saying:

> "It follows that the purported service on this company was invalid and rightly set aside. *Philadelphia & R. R. Co.* v. *McKibbin*, 243 U. S. 264. and cases cited."

Philadelphia & R. R. Co. v. *McKibbin*, though brought before the passage of the Clayton Act, is thus cited as of continued authority on the question of jurisdiction, notwithstanding the fact that the *General Investment Company* case was distinctly brought under the Clayton Act. Much more must the *People's Tobacco Co.* case be regarded as still an authority.

This point is raised by specifications of error Nos. 1 and 2 (*supra*, p. 22).

POINT II.

The defendant-in-error, while a customer of the plaintiff-in-error, was a participant in the latter's unlawful acts and was, therefore, in pari delicto, and the profits earned by defendant-in-error during the period of such illegality cannot be used as a standard by which to measure the damages which it alleges it sustained in the period for which it was allowed to recover. There is, therefore, no competent proof of damages in the record.

First: The defendant-in-error throughout the period during which it was an Eastman customer was an active and voluntary participant in the alleged combination, conspiracy and other unlawful acts which the plaintiff-in-error was

charged with conducting and committing. It expressed its approval of the Eastman system, acquiesced in and complied with it; repeatedly agreed in writing to maintain it; did all that it could to promote the system by calling attention to alleged violations of the Terms of Sale, and practiced espionage upon its competitors for the purpose of securing evidence of such violations. It enjoyed all the advantages which flowed from the restrictions imposed by the Terms of Sale upon its competitors, and as a reward for its participation in the illegal system, received refunds amounting to no less than $10,767.31 (Rec. 235). The defendant-in-error must, therefore, be considered to have agreed to and to have acquiesced in and ratified the illegal system, and thereby to have become a party to the wrongdoing and itself to have violated the Anti-Trust Acts (Statement of the case, pp. 10-14).

1. The test to be applied as to the legal position of defendant-in-error, while a customer of the plaintiff-in-error under its terms of sale, is this: Would the Court have then given relief to either party to the illegal contract for injuries caused by the other party and growing out of the contract relation? The answer must be in the negative.

McMullen v. *Hoffman*, 174 U. S. 639, 654, 669.
Coppell v. *Hall*, 7 Wallace, 542, 558.
Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227, 262.

Harriman v. *Northern Securities Co.*, 197 U. S., 244, 295-6.
Hall v. *Corcoran*, 107 Mass. 251, 253.

In *Coppell* v. *Hall*, 7 Wallace, 542, at pp. 558-559, Mr. Justice Swayne, referring to the parties to an illegal contract, said:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. • • • Where the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

In *McMullen* v. *Hoffman*, 174 U. S. 639, at p. 669, Mr. Justice Peckham says of an illegal contract:

> "The Court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest."

In *Hall* v. *Corcoran*, 107 Mass. 251, 253, the rule is tersely stated by Gray, *J.*, afterwards Mr. Justice Gray of this Court:

> "The general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part."

In *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, plaintiff, which was an illegal combination, in an action at law sought to recover from the defendant for the value of goods delivered to the defendant in pursuance of the illegal agreements on which the combination was based. At p. 262, Mr. Justice Harlan says:

> "Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.
>
> "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."

2. Mere participation and acquiescence by the defendant-in-error in the unlawful system of plaintiff-in-error made the former a party to the wrongdoing and itself a violator of the Sherman Act.

Sage v. *Hampe*, 235 U. S. 99, 105.
Victor Talking Machine Co. v. *Kemeny*, 271 Fed. 810, 816-17; C. C. A., 3rd Cir., Mar. 1921.
Eastman Kodak Co. v. *Blackmore*, 277 Fed., 694; C. C. A., 2nd Cir., Dec. 1921.
Tilden v. *Quaker Oats Co.*, 1 F. (2d), No. 2, 160, 166, Advance Sheets, Nov. 20, 1924, C. C. A. 7th Cir. decided July, 1924.
Bluefields S. S. Co. v. *United Fruit Co.*, 243 Fed. 1, 13, 18, C. C. A., 3rd Cir., June, 1917.

In *Sage* v. *Hampe*, 235 U. S. 99, at p. 105, Mr. Justice Holmes said:

> "A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for non-performance than it creates an equity to compel the contractor to perform. *A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 63."

In *Victor Talking Machine Co.* v. *Kemeny*, 271 Fed. 810, C. C. A. 3rd Cir., Mar. 1921, the plaintiff Kemeny, who had been a customer of the defendant Victor Talking Machine Company, under an illegal price maintenance system, had been dropped by the defendant and had sued for damages. It was contended by the defendant that the damages grew out of the illegal con-

tract, and that the plaintiff, having been a part of the system or combination and thereby having participated in a violation of the law, could not be heard to complain of injury to his business resulting therefrom. The Court, by Woolley, *C. J.*, at pp. 816-17, said:

> "If we were to find as the defendant assumes that the cause of action is based on conduct involved under the contract of license with the plaintiff, concluding with its cancellation, we should not hesitate to hold that the plaintiff was as guilty as the defendant in violating the law, and that the principle on which *Bluefields Steamship Co., Limited* v. *United Fruit Co.*, 243 Fed. 1, was decided would apply to him and preclude recovery. *In pari delicto potior est conditio defendentis.*"

In *Eastman Kodak Co.* v. *Blackmore*, 277 Fed. 694, 2nd Cir., the plaintiff Blackmore, who had been a customer of the defendant, Eastman Kodak Company, *under the very system and terms of sale involved in the instant case*, had sued that Company for damages resulting from its refusal to sell him goods after a certain date. The facts were almost identical with those in the instant case. Participation in the alleged wrongful system was proved by the same class of evidence as that which the present record discloses. (277 Fed. 696). Commenting on these facts, Mayer, *C. J.*, says at pp. 697-8:

> "From the foregoing outline it is apparent that during the period of 1908 to June, 1913, plaintiff acquiesced and actively participated in defendant's so-called restrictive sales system. * * *

> "During this period he gained such advantages as accrued from the price-fixing system, and from the exclusion of those dealers who, unlike plaintiff, would not accede to this method of doing business * * *."

Then after quoting from *Hall* v. *Corcoran,* 107 Mass. 251, 253, *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227, *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1, and other cases cited above, Judge Mayer concludes at p. 699 as follows:

> "The proposition of plaintiff, in effect, is that, while he joined with defendant in the illegal method of doing business after 1908 and took such advantages as sprang therefrom, he may nevertheless recover damages caused, as he claims, during the period when he and defendant were wrongdoers. With this proposition we are unable to agree."

In *Tilden* v. *Quaker Oats Co.,* 1 Fed. (second series), Adv. Sheets No. 2, 160, C. C. A., 7th Cir., July, 1924 (which arose under Section 7 of the Sherman Act) at p. 166, the Court said:

> "The fact of entering into the contract, if it was unlawful and produced damage, is shown by the complaint to have been a voluntary wrongful participating act of the corporation Cereal Company, and being such, bars recovery."

Citing among other authorities, *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694, 698, 699 (C. C. A. 2d Cir.); *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed. 810, 816 (C. C. A. 3rd Cir.); *Bluefields*

S. S. Co. v. *United Fruit Co.*, 243 Fed. 1, 18 (C. C. A. 3d Cir.).

3. The assumed fact that defendant-in-error accepted the terms of sale and joined with plaintiff-in-error in maintaining the latter's illegal system because, as stated by the learned Trial Judge in his charge: "*he needed the goods and that was the only way he could get them,*" (Rec. 144) did not excuse the defendant-in-error nor relieve it of the penalties of one who is *in pari delicto*. Its necessity, if such there was, did not constitute legal duress.

In *Eastman Kodak Co.* v. *Blackmore*, 277 Fed. 694 at p. 699, under precisely similar circumstances and in reference to the same terms of sale, the Circuit Court of Appeals in the Second Circuit held that "*there was no evidence of coercion in its legal acceptation.*"

In *Dennehy* v. *McNulta*, 86 Fed. 825, C. C. A. 7th Cir. (1898), the plaintiff sought to recover from an illegal combination of distillers on certain rebate vouchers, representing excessive payments for supplies, claiming that the payments had been made under constraint or duress. Holding that no actual duress was shown, and that there were no grounds on which to base the recovery, the Court said, p. 829:

> "At the utmost, the circumstances here assumed show *an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases from the illegal combination,*

> because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed."

Certiorari was refused by this Court, (176 U. S. 683).

In *Detroit Edison Co.* v. *Wyatt Coal Co.*, 293 Fed. 489, C. C. A., 4th Cir., Nov. 1923, the plaintiff, which was a public service corporation supplying heat, light and power in Detroit, Michigan, and engaged at the time in furnishing its services to the Government for war work, sought to recover from the defendant certain amounts illegally exacted by the defendant for coal sold to the plaintiff, which amounts the plaintiff claimed it *had been compelled to pay, by the nature of its business, in order to secure prompt deliveries.* It was held that, inasmuch as the extra payments were in violation of the statute, to which violation the plaintiff contributed, under the well established rule, the Court would not permit a recovery. At p. 492, Waddill, *Circuit Judge,* said:

> "Conceding that the plaintiff's conduct in the transaction was less reprehensible and less flagrant than that of the defendant, still, without the plaintiff's co-operation with the defendant, the latter's effort would have proven abortive, and there would have been no actual and effective violation of the law.

> * * * It is true the plaintiff paid out money which it need not have done; but that does not avail it, since in this class of cases the law will not lend itself to afford one of two wrongdoers relief against the other."

See also, as to what constitutes legal coercion or duress.

> *Radich* v. *Hutchins*, 95 U. S. 210, 213.
> *Chesebrough* v. *United States*, 192 U. S. 253, 259.

It thus appears that the Circuit Courts of Appeal of the 2nd 3rd, 4th and 7th Circuits have joined with this Court in sustaining the principle here contended for, and in holding that both parties to such an illegal agreement as that disclosed by the present record are *in pari delicto*.

4. The case of *Ramsey* v. *Associated Bill Posters*, 260 U. S. 501, is not in conflict with the foregoing argument. In that case certain bill posters and twelve advertising agents, styled "official solicitors," were charged with having formed an illegal combination. The case came up on demurrer to the complaint. From the record of the *Ramsey* case in this Court, it appears, (pp. 11, 13), that, prior to July, 1911, the plaintiff had been what was called a "licensed solicitor," by which was meant that he was permitted to solicit business from advertisers and to turn the same over to bill posters who were members of the defendant Association. It does not appear from the complaint that plaintiff was required to do anything illegal, or, if so, that he complied with such requirements.

In July, 1911, a change took place in the methods of the defendants' business, whereby they restricted the number of licensed solicitors to twelve, thereafter termed "official solicitors," and imposed other terms upon their members, and cancelled the license which the plaintiff had theretofore had. The defendants thus formed a new combination, which included twelve official solicitors, but did not include the plaintiff. This latter combination is the one which was found by Landis, *District Judge,* to be unlawful (*U. S.* v. *Associated Bill Posters,* 235 Fed., 540, 541), and it was also apparently this latter combination which this court had in mind, for at p. 510, Mr. Justice McReynolds says:

> "The following were among the means adopted for carrying out the purposes of the combination and conspiracy * * * (d) a schedule of prices has been fixed and members have been prohibited from accepting certain kinds of work from anyone except solicitors (*twelve in all*) arbitrarily selected and licensed."

Both of these references can apply only to the combination as it existed after July, 1911, by which the number of solicitors was for the first time restricted to twelve. It was not until the new combination had been made that plaintiff suffered any damage or made any complaint (see Record in *Ramsey* case, p. 13). Hence, we assume that the language used by Mr. Justice McReynolds has no bearing upon any combination except the one made July, 1911, when he says, at p. 512:

> "We find no adequate support for the claim that plaintiffs were parties to the combination of which they *now* complain."

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, and *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, do not help the defendant-in-error. The *Connolly* case is clearly distinguished in *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, at p. 260, and a similar distinction is made in the *Corn Products* case, 236 U. S. at p. 177.

SECOND: The amount of the profits earned by defendant-in-error, while a customer of the plaintiff-in-error, it being a participant in the latter's unlawful acts and therefore *in pari delicto,* cannot be used as a standard by which to measure damages alleged to have been sustained by the defendant-in-error after it had ceased to be such customer.

1. The only measure of damages proposed by defendant-in-error and allowed by the Court was the *assumed net profits* which defendant-in-error claims it would have made after it ceased to be an Eastman customer, had it been allowed to purchase Eastman goods at dealers' discounts, such net profits being arrived at by taking the *actual gross profits* which defendant-in-error claims to have made during the period before it so ceased, and deducting therefrom a speculative cost of conducting the increased business, which it is claimed would have resulted from the handling of Eastman goods. In short, the whole recovery hinged upon the use of the alleged *gross* profits of the earlier period, as a standard of comparison by which to determine the amount of *net* profits claimed to have been lost in the later period.

It is well settled that one may not use the earnings or profits which he made in the course of a violation of law, or in a business which was illegal, as a measure of the damages which he suffered after the date when he claimed that his business was interrupted.

Riggs et al. v. *Palmer, et al.*, 115 N. Y. 506, 511.

Murray v. *Interurban Street Railway Co.*, 118 A. D. 35, (N. Y.), 1907.

Victor Talking Machine Co. v. *Kemeny*, 271 Fed. 810, 819, (C. C. A., 3rd Cir., Mar. 1921).

Eastman Kodak Co. v. *Blackmore*, 277 Fed. 694, 699 (C. C. A., 2nd Cir., Dec. 1921).

Raynor v. *Valentin Blatz Brewing Co.*, 100 Wisc. 414.

In *Riggs et al.* v. *Palmer, et al.*, 115 N. Y. 506, Earl, *J.*, says at p. 511:

> "All laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."

In *Murray* v. *Interurban Street Railway Co.*, 118 A. D. 35 (N. Y. App. Div., 1907), the Court

refused to allow a gambler, who had been injured in a street railway accident, to prove the profits previously made by him as a gambler as a basis for estimating his losses resulting from the accident. Referring to *Riggs et al.* v. *Palmer, et al., supra,* the Court says at p. 37:

> "The plaintiff according to his own testimony was violating the law, and when a person is committing a crime, he cannot use the wages paid to him for doing it as the basis for a recovery in a civil action. (*Riggs* v. *Palmer,* 115 N. Y. 506). * * * The law does not permit proof of its violation for the purpose of enriching the pockets of the violator."

In *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed., 810, 819, Woolley, *Circuit Judge,* said:

> "We are constrained to hold that the learned trial judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits cannot, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition and create monopoly."

In *Eastman Kodak Co.* v. *Blackmore,* 227 Fed. 694, at p. 699, Mayer, *C. J.,* said:

> "If plaintiff and defendant were engaged in an illegal restrictive system, from 1899 to 1902, obviously that period cannot be set up

> as a standard with which to compare the profits of the period after 1908. It is necessary upon this point to refer merely to what was said in *Victor Talking Machine Co.* v. *Kemeny, supra,* at pages 818 and 819."

In *Raynor* v. *Valentin Blatz Brewing Co.*, 100 Wisc. 414, where it was sought to measure damages by the profits made in the operation of a theatre and saloon on Sundays, the Court said, p. 420:

> "But the profits of an unlawful business cannot be any proper basis for the estimate of damages. This would seem to be too clear for argument. * * * the profits made on Sundays, resulting from a criminal violation of the Sunday law, cannot form any legal basis for the estimate of damages."

The decision in *Ramsey* v. *Associated Bill Posters,* 260 U. S. 501, has no bearing upon this point. There was no question there of damages, as the case was before the Court on demurrer to the complaint.

2. The soundness of this general proposition was indeed conceded by the learned Trial Judge in his charge in the instant case (Rec. 429-30). He said:

> "The fact that he (the plaintiff) was dealing with a monopoly, may affect this case notwithstanding, *when you come to fix the measure of damages, because he can't recover for the future on the basis of profits that he made under monopolistic conditions in the business,* if those profits were increased by the monopoly."

The learned Judge, however, erred by telling the jury that they might analyze the plaintiff's gross profits of the earlier period and determine for themselves how much of such profits was due to monopolistic conditions and how much was purely normal and that they might then take the amount of such assumed normal profits as a measure of damages. (Rec. 429-30).

Even if such analysis had been legally permissible, there was no proof whatever upon which could be based a segregation of monopolistic from normal profits. But in fact, the rule of law so announced is contrary to the doctrine of all the cases cited above on this point.

Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227, 262.

This point is raised by specifications of error Nos. 1, 3c, 5a, 6 and 7c, d, e (*supra*, pp. 22-29).

POINT III.

There was no proof of damages such as, under the authorities, is necessary to enable plaintiff, in cases under the Anti-Trust Acts, to recover any damages whatever.

Keogh v. *Chicago & Northwestern R. R. Co.*, 260 U. S. 156.

Central Coal & Coke Co. v. *Hartman*, 111 Fed. 96, C. C. A., 8th Cir., 1901.

Locker v. *American Tobacco Co.*, 218 Fed. 447, C. C. A., 2nd Cir., Nov. 1914.

American Sea Green Slate Co. v. *O'Halloran*, 229 Fed. 77, C. C. A., 2nd Cir., Dec. 14, 1915.

Cramer v. *Grand Rapids Showcase Co.*, 223 N. Y. (Court of Appeals) 63, 68 (Feb. 1918).

I. In *Keogh* v. *Chicago & Northwestern Ry. Co.*, *supra*, at pp. 164-165, this Court laid down the rule of damages as follows:

> "Under Section 7 of the Anti-Trust Act, as under Section 8 of the Act to Regulate Commerce (*Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184), recovery cannot be had unless it is shown that, as a result of defendants' acts, damages in some amounts susceptible of expression in figures resulted. *These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.*"

A footnote refers to *Central Coal & Coke Co.* v. *Hartman, Locker* v. *American Tobacco Co.*, and *American Sea Green Slate Co.* v. *O'Halloran*, *supra*, all of these being cases under the Seventh Section.

In *American Sea Green Slate Co.* v. *O'Halloran*, 229 Fed. 77 (C. C. A., 2nd Cir., Dec. 14, 1915), Lacombe, *Circuit Judge*, said at p. 79:

> "To recover under the seventh section plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. *These damages must be proved by facts from which their existence is logically and legally inferable*—not by conjectures or estimates. *They must not be speculative, remote or uncertain.*"

In *Central Coal and Coke Co.* v. *Hartman*, 111 Fed. 96 (C. C. A., 8th Cir., 1901) at pp. 98-9, Sanborn, *Circuit Judge*, said:

> "Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. * * * The anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. *Howard* v. *Manufacturing Co.*, 139 U. S. 199, 206; *Cincinnati Siemens-Lungren Gas Illuminating Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 205; *Trust Co.* v. *Clark*, 92 Fed. 293, 296, 298; *Simmer* v. *City of St. Paul*, 23 Minn. 408, 410; *Griffin* v. *Colver*, 16 N. Y. 489, 491. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. * * * *The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption* if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this *actual net income*, compared with that which the jury infers from the data to which refer-

> ence had been made the *net income* would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. * * * *And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation.* In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery."

This decision of Judge Sanborn has also been approved in the following cases, among others:

> *McSherry Mfg. Co.* v. *Dowagiac Mfg. Co.*, 160 Fed. 948, 961, (C. C. A., 6th Cir., 1908).
>
> *Montgomery* v. *C. B. & Q. R. R. Co.*, 228 Fed. 616, 620-21, (C. C. A., 8th Cir., Nov. 1915).

And the same rule in almost the same words is laid down in *Cramer* v. *Grand Rapids Showcase Co.*, 223 N. Y., Court of Appeals, 63, 68, decided Feb. 1918.

2. The evidence as to damages in the instant case is collated in the Statement of the Case (pp. 15-21). It is clear that in no singular particular does this evidence conform to the rule laid down in the preceding cases.

(a) Defendant-in-error offered no proof of the amount of its capital either before or after the alleged interruption, and either as to the whole

amount invested in its entire business or as to the amount invested in that part of the business which concerns Eastman goods.

(b) The sale of Eastman goods formed only a small part of the total sales of defendant-in-error. See table, p. 21, from which the following appears:

Year	*Plaintiff's Sales of Eastman Goods* (Rec. 212)	*Plaintiff's Total Sales*
1906	$34,494.97	$90,404.65 (Rec. 313)
1907	35,208.48	105,205.13 (Rec. 289)
1908	29,196,06	101,682.47 (Rec. 335-6)
1909	32,258.04	91,876.00 (Rec. 236)

The only evidence as to expenses was as to the expenses of the entire business (See table, p. 21). Defendant-in-error made no attempt to show its separate cost of handling Eastman goods and in the nature of things none could be made because its business was conducted as an entirety and not in separate departments. Hence, it was impossible for the jury to say what the "customary monthly or yearly *net profits* of the business" of defendant-in-error in Eastman goods were before the alleged interruption.

(c) If the entire business be considered as a unit and the total expenses and cost of goods be deducted from the entire receipts, then the defendant-in-error lost money in 1908 and 1909; whereas, in 1910 and 1911 after the alleged interruption, it cleared a substantial net profit (Statement of Case, pp. 17-18, 21).

(d) The statements of the witness Goodhart that he could have handled Eastman goods after the alleged interruption at an expense of only "five per cent" were pure "conjecture, or estimate" and were "speculative, remote and uncertain" (to use the words of Lacombe, *Circuit Judge,* in *Slate Co.* v. *Halloran, supra*). The testimony was a guess on the witness' part and it was error to allow the jury also to guess from such testimony what damages, if any, the plaintiff suffered.

3. There is no provision in any of the decisions cited above for allowing the plaintiff, in such cases, to estimate that his total sales would have been increased, if permitted during the period when he was unable to procure the goods in question.

The precise point was decided by the Appellate Division of New York State, in 1904, in *Horton* v. *Hall & Clark Mfg. Co.*, 94 A. D., 404, at p. 408, holding that no evidence of increase was admissible.

Moreover, Sibley, *J.*, held to the same effect in his opinion overruling the demurrers in the instant case, where he says (Rec. 661):

> "I do not think the claim that the business was growing at a given percentage per year could project into the future the same growth. That would involve too much of a speculation."

Frey v. *Welch Grape Juice Co.*, 240 Fed. 114, was reversed and dismissed by the Circuit Court of Appeals in the 4th Circuit (261 Fed. 68), in view of *U. S.* v. *Colgate & Co.*, 250 U. S. 300.

Hence, it is clear that the plaintiff in that case at no time had any cause of action against the defendant. The case should have been dismissed at the threshold, and in any event does not apply to the facts in the instant case.

4. No attempt was made by defendant-in-error to prove any damages resulting from the acquisition by plaintiff-in-error of competing concerns. However, all of the goods, right to make which was thus acquired (except photographic plates), were at once added to the terms of sale, which were thereafter acquiesced in and agreed to by defendant-in-error (Rec. 322, 250). Photographic plates did not appear in the terms of sale, because plates were never restricted (Rec. 322); but defendant-in-error could get all the plates it wanted, either before or after it ceased dealing with the Eastman Company (Rec. 263), and the discounts on Stanley, Seed and Standard plates were the same after as before their acquisition by plaintiff-in-error (Rec. 196), so that no possible damage resulted to defendant-in-error from such acquisition. "Appendix II" hereto annexed is a table showing the principal acquisitions as to which any proof was offered, and the Terms of Sale in which the corresponding goods subsequently appeared.

5. The case of *Lincoln* v. *Orthwein*, 120 Fed. 880, was not brought under the Anti-Trust Acts and was decided before any of the cases cited in this brief on the point of damages. Moreover, in that case, the plaintiff proved the net profits of his business before the interruption.

In the instant case, defendant-in-error has utterly failed to prove such net profits. So that there is no basis for an estimate of what its profits might have been after April, 1910.

6. The assumption that, had defendant-in-error handled Eastman goods after April, 1910, it would have sold at least as great a quantity of them as before that date is entirely speculative, not based on any data from which the jury could make any logical inference, and besides is discredited by the other conditions of the business of defendant-in-error after the date named. For, beginning with March, 1910, defendant-in-error bought much more of Ansco goods per year than it had ever before bought of Eastman goods in a like period (Statement of the Case, p. 15); and it is contrary to all mercantile experience to suppose that a merchant could take on an entirely new line of similar goods, make largely increased sales of them, and not place many of them with his old customers. How could it be otherwise? Where would a merchant first look to place his new line except with those who were accustomed to resort to his shop or were among those from whom he regularly solicited trade? And for every sale of Ansco goods thus made, his sales of Eastman goods would be so much less. But not only would this law of human and business experience apply, but also defendant-in-error bound itself, by every means and device known to the progressive merchant to push Ansco goods at the cost of all others (Rec. 243). The figures best show how completely defendant-in-error would have done this; for its purchases

of Eastman goods never exceeded $26,364.87 in any one year (Rec. 236), whereas, in its first year with Ansco goods, it purchased of them $50,437.26, and these purchases increased by 1915 to $104,108.89 in a single year (Rec. 246).

This point is raised by specifications of error Nos. 1, 3, 4, 5, and 7a, b, (*supra*, pp. 22-24, 26-7).

POINT IV.

The burden was on the defendant-in-error to prove affirmatively that plaintiff-in-error, in refusing to sell the defendant-in-error at dealers' discounts after April, 1910, was actuated by a monopolistic motive. This was not done. Hence, such refusal, being within the legal rights of plaintiff-in-error, was not a legal wrong which could form the basis of any recovery.

1. The defendant-in-error offered no proof as to the reason why plaintiff-in-error declined to continue defendant-in-error as a customer on the terms formerly in force between them. The presumption is that the refusal was made either for good or for purely indifferent reasons, and that it was therefore entirely legal. (*United States* v. *Colgate & Co.*, 250 U. S. 300, 307.) This presumption not having been overcome, the plaintiff-in-error was entitled to a dismissal or a direction on this ground alone.

2. The record, it is true, fails to show expressly whether plaintiff-in-error knew the provisions of the Ansco contract at or about the time it was

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entered into. The defendant-in-error on its part assumed that plaintiff-in-error had such knowledge (Rec. 167). In any event, since these provisions, if known, would have furnished a lawful reason for terminating the relations between the parties, we submit that, even if the plaintiff-in-error was not aware of them at the time, it should be permitted to take advantage of them when they became known to it. This is the well-established rule in the law of Master and Servant.

In *Re Nagle*, 278 Fed. 105, 109, C. C. A. 2nd Cir. 1921.

Farmer v. *First Trust Co.*, 246 Fed. 671, 673, C. C. A. 7th Cir. 1917.

Carpenter Steel Co. v. *Norcross*, 204 Fed. 537, 539, C. C. A. 6th Cir. April, 1913.

Also, in the law of Agency:

Sanborn v. *United States*, 135 U. S. 271, 278.

McGar v. *Adams*, 65 Ala. 106, 109.

Substantially the same rule applies wherever a fiduciary relation exists. An apparently contrary rule in the law of Contracts has been modified so that it no longer conflicts with the foregoing authorities.

Strasbourger v. *Leerburger*, 233 N. Y. Ct. Appeals, 55, 60, Decided February, 1922.

Granger Co. v. *Universal Mach. Corp. Ltd.*, 193 N. Y. App. Div. 234, 235. Decided July, 1920.

In the *Granger Company* case, the contrary rule was held to apply only "when the party, with full knowledge of all the objections on which he might rely, deliberately and formally assigns certain objections and is silent as to others."

3. The existence and operation of the Ansco contract with its unfair provisions having been admitted, the jury should not have been permitted to ignore the effect of that contract, nor to charge plaintiff-in-error, in the absence of any proof, with an unlawful purpose in ceasing to sell its recreant customer.

This point is raised by specifications of error Nos. 5c, d, (*supra*, p. 25).

POINT V.

The judgment should be reversed and the cause remitted to the United States Circuit Court of Appeals for the Fifth Circuit, with instructions to enter a judgment of reversal, which judgment so to be entered shall direct the cause to be further remitted to the United States District Court for the Northern Division of the Northern District of Georgia, with instructions to enter a judgment in favor of the plaintiff-in-error, defendant below.

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APPENDIX I.

The intention of Congress in changing the language of Section 12 of the Clayton Act, from that used in Section 7 of the Sherman Act, is made clear by reference to the legislative proceedings.

Duplex Co. v. *Deering*, 254 U. S. 443, 474-5.

The Clayton Act was introduced as H. R. 1567 on April 14, 1914, and referred to the Judiciary Committee of the House, from which it was reported on May 6, 1914 (H. Rept. 627). The section now numbered 12, was then reported as Section 10, and read in respect to this point:

> "Sec. 10. That any suit, action or proceeding under the Anti-trust laws, against a corporation, may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found."

In the report of the House Judiciary Committee accompanying the bill, appears the following:

> "Venue.—Sec. 10 relates to procedure and provides that any suit, action or proceeding under the Anti-trust laws, against a corporation, may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found."

In the House debate, some question seems to have arisen as to the meaning of the word "found," as used in the bill, which word some members thought applied only to the state of incorporation, whereupon Congressmen Floyd,

Century Camera Co. Century Cameras and other Century goods.	Terms of Sale of Jan. 12, 1904, Plff's. Ex. 40 (Rec. 579); of Jan. 22, 1907, Def. Ex. 28 (Rec. 597), and of Jan. 1, 1908, Plff's Ex. 41 (Rec. 584).
Rochester Optical Co. Premo and other cameras. Film pack. All other "Rochester Optical" goods.	Terms of Sale of Jan. 12, 1904, Plff's. Ex. 40 (Rec. 579); Jan. 22, 1907, Def. Ex. 28 (Rec. 597, 599); Jan. 1, 1908, Plff's. Ex. 41 (Rec. 585, 589).
Folmer & Schwing Mfg. Co. Graflex and other cameras.	Terms of Sale of Jan. 22, 1907, Def. Ex. 28 (Rec. 597) and of Jan. 1908, Plff's. Ex. 41 (Rec. 585).
Photo Materials Co. American Aristotype Co. Nepera Chemical Co. New Jersey Aristotype Co. Kirkland Lithium Paper Co. General Aristo Co.	Terms of Sale of May 1, 1901, Def. Ex. 2 (Rec. 591, 594) being the terms of sale sent to plaintiff, Sept. 17, 1901, and acknowledged by it (Rec. 204-5).
Joseph DiNunzio Angelo Platinum Paper.	Terms of Sale of Jan. 22, 1907. Def. Ex. 28 (Rec. 597).
Artura Paper Co. Artura Paper.	Acquisition approved by plaintiff in letters (Rec. 231-3).
Contracts with General Paper Co. (Rec. 18-19).	Original contract made in December, 1898. Matter of common knowledge and well known to plaintiff before plaintiff became defendant's customer. Covered by various terms of sale.

Seed Dry Plate Co. Standard Dry Plate Co. Stanley Dry Plate Co.	Never restricted. Discounts not changed by defendant. Readily obtainable (Rec. 263). Plaintiff received discounts on purchases of these plates. (Rec. 196).
Specific goods enumerated in petition Aristo Platino, Aristo Junior, Aristo Self-toning, American Platinum, American Aristo Collodio Carbon Papers.	Terms of Sale of May 1, 1901, Def. Ex. 2 (Rec. 594).
Aristo Gold, Aristo Carbon Sepia, Angelo Platinum Papers. No. 2 Brownie Developing Box. F. & S. Printing & Enlarging cameras. Various Kodaks.	Terms of Sale of Jan. 22, 1907. Def. Ex. 28 (Rec. 597, 600).
Circuit Cameras	Terms of Sale Jan. 1, 1908, Plff's. Ex. 41 (Rec. 584).
Panorama Kodaks	Terms of Sale of April 15, 1901, Plff's. Ex. 39 (Rec. 575).
Commercial Aristo	Terms of Sale of Oct. 1900, Plff's Ex. 38 (Rec. 574).